IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

IN THE MATTER OF THE APPLICATION

of

CHARLES J. O'CONNOR, III,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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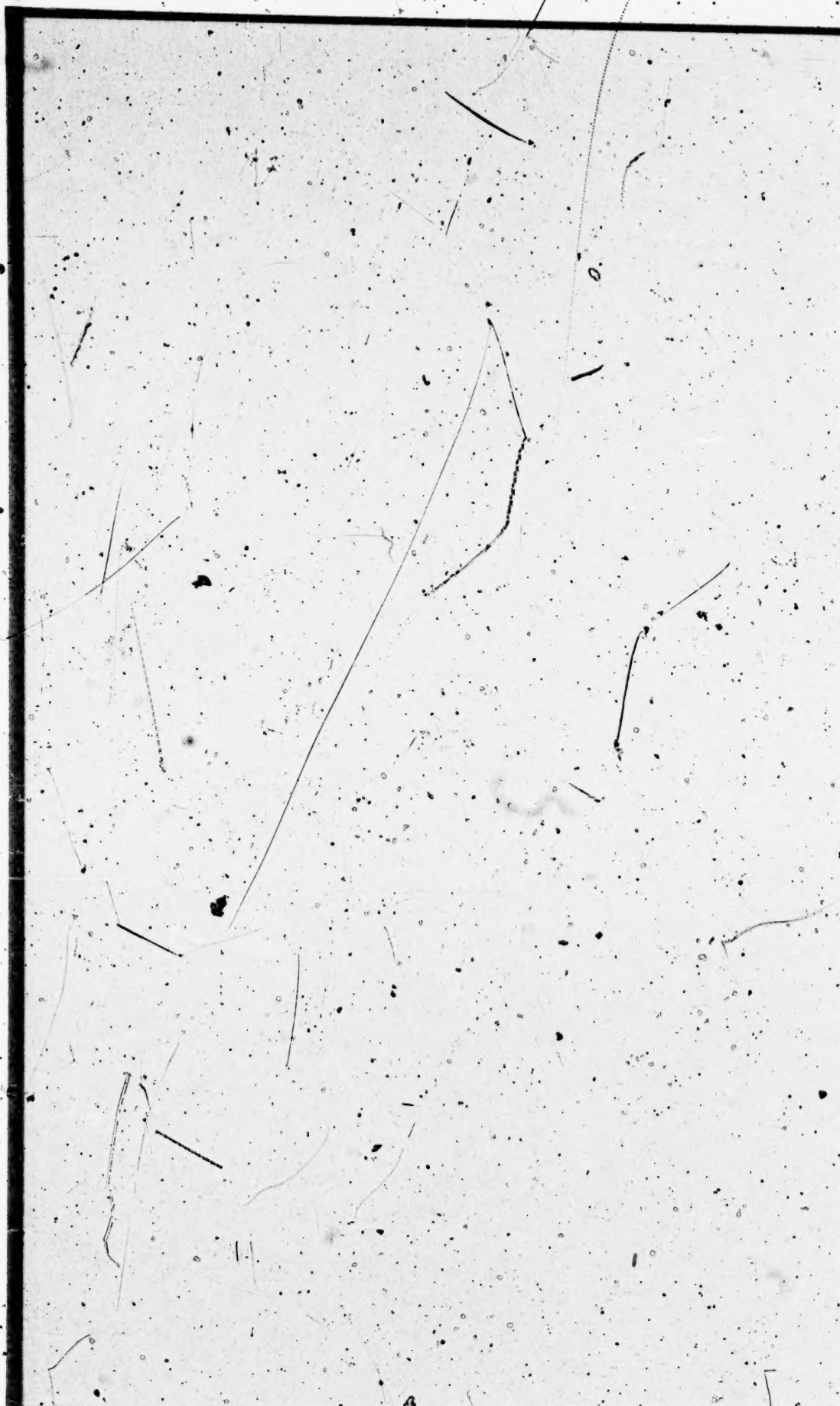


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Counter-Statement of Questions Presented

1. Does the action of a duly constituted Character Committee in refusing to certify to an applicant's character, when such action is taken upon notice to the applicant with opportunity to be heard, and the right to object to the bases thereof, deny the applicant any constitutionally guaranteed right?

2. May a bar applicant, whose character and fitness have long been at issue, have certification to his character withheld for refusing to provide the Character Committee with unprivileged answers to material questions, thereby obstructing the investigation of his qualifications?

Counter-Statement of Facts

This is a petition by Charles J. O'Connor, III (hereinafter petitioner) for a writ of certiorari with respect to a final order of the Supreme Court of New Jersey dated October 19, 1971, denying petitioner's motion to strike an unfavorable report of the Essex County Committee on Character and Fitness (hereinafter Character Committee),* and, also denying petitioner's motion for plenary admission to the New Jersey Bar.

Petitioner graduated from Rutgers Law School in June of 1956. On September 28 of that year, he filed a petition with the Supreme Court of New Jersey requesting relaxation of the court rule requiring sixty days' notice of intention to take the Bar examination scheduled for October 30 and 31. On October 18, 1956, at a hearing before a subcommittee of the Character Committee, it was established that petitioner had been arrested on charges of assault, had been requested to withdraw from preparatory school, and had been convicted of numerous motor vehicle violations resulting in the forfeiture of his driving privilege in the State of New Jersey. In view of these circumstances, the Character Committee determined that it was unable to properly evaluate petitioner's fitness for admittance to the New Jersey Bar prior to the commencement of the scheduled examination, and therefore recommended that petitioner be allowed to take the Bar examination, subject to obtaining a satisfactory character and fitness certification at a later date. After suc-

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* These recommendations of the Character Committee were based upon the entire record of petitioner's previous bar admission proceedings before the Character Committee and before the Supreme Court of New Jersey which dated back to 1956. This extensive record has been certified to this Court by the Supreme Court of New Jersey.

cessfully completing the Bar examination, petitioner entered the Army.

On March 27, 1959, subsequent to his separation from military service, petitioner filed a preliminary statement with the Character Committee for the purpose of effectuating his admission to the Bar. The statement outlined petitioner's prior history of convictions as follows: 1950, careless driving; 1951, stop sign violation; 1953, speeding; 1953, careless and reckless driving; 1958, driving while intoxicated. In addition, the statement reflected that petitioner had been charged on another occasion in 1958 with driving while intoxicated, and had been bound over for the Grand Jury in 1953 for assault and battery. The Character Committee subsequently ascertained that petitioner's driver's license had been revoked in 1953 and restored in 1956, and that his registration was suspended in May 1959 for failure to file proof of financial responsibility in accordance with the motor vehicle statutes.

In October of 1959, the Character Committee contacted petitioner and notified him of its intention to hold hearings to consider applications for certification. Petitioner requested at that time that the Character Committee postpone consideration of his application until he completed his period of clerkship. On November 9, 1959, seven days after completion of his clerkship, petitioner applied directly to the Supreme Court of New Jersey for admission to the Bar, asserting that the Character Committee was biased and prejudiced against him, that he could not obtain an impartial determination from it, and that the Character Committee had been dilatory and incompetent in processing his application and had subjected him to "unbearable personal insult, invective, false accusations, administrative incompetence, undue delay, procrastination and harassment."

On January 4, 1960, the court denied petitioner's motion for admission to the Bar. The court further requested the Character Committee to continue its consideration of petitioner's qualifications and to file with the court a report and recommendation based upon further investigation and formal hearings.

Pursuant to the order, the subcommittee held formal hearings with respect to petitioner's qualifications on February 26 and May 6, 1960. Petitioner attended the hearings with counsel. He appeared evasive with respect to his past motor vehicle record and his work record since leaving the Army. Moreover, although he outlined in detail his participation in the events that led to his 1951 arrest on the assault charge, his version before the subcommittee failed to conform with the version he gave to the State Police at the time of the arrest, which version appeared to show that he had indeed been the aggressor in the incident (R103, May 6, 1960).

On June 17, 1960, the Character Committee forwarded its recommendations to the Supreme Court:

> "When this matter was returned to the Committee, the Committee was primarily concerned with the long list of traffic violations which appeared on Applicant's preliminary statements including conviction for careless and drunken driving. It was hoped that Applicant could show that these were not indicative of his present character. The hearings developed a pattern of behavior on the part of Applicant that appeared to place Applicant constantly in trouble up to the present time and a lack of candor before the Committee. The Committee believes that the 1951 statement of Applicant as to the facts concerning the knife fight in Ocean County was closer to the facts than the Ap-

> plicant's version of the affair as presented at the hearings. There is nothing which this Committee could find in the hearings that indicated any basic change in Applicant's character between 1951 and the present time.
>
> The Committee is unable to certify that Applicant presently has the character and fitness to qualify him for admission to the bar. The Committee assumes that the question of possible future application for certification based upon changed circumstances, is a question for the determination of the Supreme Court." (Report of the Essex County Committee on Character and Fitness dated June 17, 1960).

Petitioner never objected to these findings and recommendations. On November 28, 1960, the Supreme Court of New Jersey ordered that petitioner's application for leave to be sworn as an attorney be denied with leave to reapply to the Character Committee after December 1, 1962.

On February 8, 1963, petitioner reapplied to the Character Committee and on March 8 and April 25 of that year hearings with respect to petitioner's qualifications were again held before the subcommittee, at which time petitioner was again represented by counsel. At the April 25 hearing, testimony was heard from Herman Stern, the Chief of the Claims Section of the Veterans Administration, where petitioner had been employed for four months. He testified about petitioner as follows:

> "As his supervisor noted, the only drawback was a quick and uncontrollable temper which became evident on two occasions that I know of, at least, in the performance of his duties. As a result of

these occasions he summarily left his employment. After the first time, he was rehired. A short time thereafter another situation arose whereby he left his employment again.

* * *

I would like to, if I may, now sum up. In my opinion Mr. O'Connor would have been and could be a most desirable type of individual and employee in our line of endeavor were he able to control his feelings and emotions." (T64, 68, 69, April 25, 1963).

It was also established at the hearing that petitioner had visited another employee of the Veterans Administration three times in an attempt to dissuade him from appearing (T65-66, April 25, 1963). Other specific instances of petitioner's temperamental behavior were testified to, and it was suggested by a member of the subcommittee that psychiatric help might possibly be in order (T113, April 25, 1963). Additionally, it was noted that the Chief Justice of the Supreme Court of New Jersey had previously communicated with petitioner's counsel and determined that petitioner would not voluntarily submit to a psychiatric examination (T113, April 25, 1963). Although petitioner agreed at the hearing to submit himself to a psychiatric examination (T114, April 25, 1963), the record does not indicate that the matter was pursued with petitioner subsequent to the hearing. Petitioner refused both at the March 8 and April 25 hearings to divulge the names of cases he alleged he was handling in the Tax Court. A third hearing date was scheduled for October 3, 1963 but was cancelled when petitioner requested an opportunity to retain new legal counsel. On October 7, 1963 the Character Committee notified petitioner that a hearing date would be fixed when petitioner or his new counsel contacted the Committee.

Not until October 13, 1970, seven years later, did petitioner recontact the Character Committee. At that time he filed a brief and petition for admission to the Bar. On October 16, 1970, the Character Committee forwarded application forms to petitioner's counsel, and on November 11, these application forms were signed and sworn to by petitioner and returned to the Committee. The completed applications disclosed that petitioner was presently licensed as a real estate salesman, insurance broker, and Notary Public of New Jersey, and as an Attorney at Law in Washington, D. C.* It further reflected that on two occasions in 1968 petitioner had been charged with drunkenness, one charge of which was dismissed, while the other resulted in a finding of not guilty.

A hearing was held on November 19, 1970 before a subcommittee of the Character Committee at which time petitioner was again represented by counsel. At that time he testified that he had signed the informational forms filed with the Character Committee in blank in his lawyer's office. In addition, he was not candid as to the actual circumstances and the final disposition of the two 1968 offenses of drunkenness. In terms of these offenses petitioner's testimony was not credible. He denied being intoxicated and alleged that the first time he was arrested in 1968 he had been mugged (T21 November 19, 1970), and the second time he had been injured in an automobile accident (T29-30 November 19, 1970). The police reports submitted by petitioner's counsel did not support this testimony. In addition, petitioner again re-

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* Petitioner has alleged in his brief that since the filing of the petition he has been admitted to practice before this Court. The Supreme Court of New Jersey has no information as to the circumstances surrounding that admission or the facts conveyed by petitioner to satisfy this Court of his qualifications.

fused to divulge to the subcommittee the names and docket numbers of the cases he alleged he was handling before the Tax Court of the United States.

Subsequently, on March 17, 1971, petitioner was notified that he would be heard by the Character Committee as a whole on April 1, 1971. On March 25, 1971, counsel for petitioner objected to this procedure and declined to participate. On March 26, 1971, the Character Committee replied to petitioner's counsel that the hearing before the subcommittee on November 19, 1970 did not satisfy the full Committee that it could properly certify to petitioner's good moral character, and that as a result, the Committee as a whole would have to review the matter. Early on the morning of April 1, 1971 the Chairman of the Character Committee held a lengthy conversation with petitioner's counsel with respect to those aspects of petitioner's application and the November hearing which concerned the Committee (¶12, April 1, 1971; ¶25, Report of the Essex County Committee on Character, September 17, 1971). Petitioner's counsel represented at that time that he would endeavor to communicate with his client. However, neither the Chairman nor the other members of the Character Committee received any further communication from petitioner or his counsel and neither appeared at the hearing.

On September 17, 1971, the Character Committee made its report with respect to petitioner to the Supreme Court. This report noted that the subcommittee had been dissatisfied with certain aspects of the November 19 hearing, specifically petitioner's failure to adequately explain why he was arrested and charged with being intoxicated, after he alleged he had been mugged. Of this the Character Committee concluded that a "victim of a mugging is ordinarily not so treated" (Report of Essex County

Committee on Character, p. 10). The Character Committee further questioned petitioner's refusal to divulge the names of the cases he was handling in the Tax Court, as well as his admission that he had signed and sworn to his statement in blank. As a result of these factors, considered in light of petitioner's lengthy history before the Character Committee and the court, the Character Committee determined that it was unable to certify petitioner at that time, and notified petitioner thereof by the same date. (At least two members of the Character Committee felt that petitioner's willful failure to appear was sufficient not only to refuse certification, but to deny it altogether, but this view was rejected by the majority.)

On October 7, 1971, petitioner, through his counsel, moved before the Supreme Court of New Jersey to have the report of the Character Committee stricken, and also moved for plenary admission to the Bar. On October 19, 1971, the court denied both motions. On January 14, 1971, petitioner filed a petition for a writ of certiorari in this Court.

ARGUMENT

POINT I

The action of the Character Committee recommending the withholding of petitioner's certification afforded petitioner all of the guarantees of the constitution.

Admission to the Bar of the State of New Jersey, like entry into every other state and federal Bar, is dependent upon a showing that the applicant possesses good moral character and fitness requisite for the practice of law.

In re Hyra, 15 N. J. 252 (1954); see Jackson, "Character Requirements For Admission to the Bar", 20 Fordham L. Rev. 305 (1951). Pursuant to the regulatory power vested in it by the New Jersey Constitution (Art. VI, § II, para. 3), the New Jersey Supreme Court has enacted rules governing admission to the practice of law in this State. (R. 1:23-1, *et seq.*; N. J. Court Rules 1971). These rules which were revised as of September 13, 1971, provide *inter alia* for the appointment, by the court, of committees on character (R. 1:25). On September 14, 1971, pursuant to R. 1:25 the New Jersey Supreme Court reappointed and continued in effect the membership of the Essex County Character and Fitness Committee which had existed under the old rules. Thus, on September 17, 1971, when the Character Committee submitted its report with respect to petitioner to the New Jersey Supreme Court, it was, contrary to petitioner's assertions, duly authorized and empowered to do so. Moreover, Rule 1:25-2 which was applicable to proceedings before the Character Committee during the pendency of the petitioner's case clearly authorized the Committee (or its subcommittee) to "investigate" the character of all applicants resident in the county of its jurisdiction. The purpose of this investigation was expressed by the New Jersey Supreme Court in *In re Hyra, supra*:

> "One of the purposes of a character and fitness committee is to determine from interviews and other means at their disposal whether or not in their judgment one desirous of entering into a clerkship leading to the privilege of taking the bar examination has the character, the backbone, the integrity and the moral stamina to make him a good and acceptable member of the bar. Membership in the bar is a privilege burdened with conditions. A good character is one of them and com-

pliance with that condition is essential at the moment of admission." 15 N. J. at 253.

It is respectfully submitted that the kind of investigation contemplated by the Supreme Court of New Jersey in the court rules and delineated in *In re Hyra* was in fact conducted by the Character Committee in the instant case.

In order to place the challenged action of the Character Committee in perspective, it is crucial to note the lengthy history of petitioner before it. As has previously been observed in the counter-statement of facts, petitioner first appeared before a subcommittee of the Character Committee in 1956, at which time questions arose as to his character. Subsequently in 1960, petitioner again appeared at formal hearings before a subcommittee which resulted in the Character Committee's declining to recommend certification because of petitioner's lack of candor and a long history of troublesome behavior including assault, and incidents involving drinking, indicative of poor character. Upon these findings, the Supreme Court of New Jersey denied petitioner admission to the Bar with leave to reapply after December 1962. In 1963, petitioner reapplied and attended two formal hearings before the subcommittee which uncovered his serious temperment problems and brought a suggestion from the Character Committee that petitioner obtain a psychiatric evaluation. Petitioner subsequently postponed the final day of hearing in 1963 and did not recontact the Character Committee for seven years. This, in conjunction with petitioner's failure to obtain a psychiatric evaluation, is the background which faced the subcommittee on November 19, 1970.

At that time, the entire history of the case was reviewed by the subcommittee with petitioner and his coun-

of troublesome incidents and problems with law enforcement which would support and reinforce such a negative application. Where, as here, subsequent interviews with the petitioner in no way ameliorate the pejorative material contained in the application, common sense requires further inquiry prior to final action. Such further inquiry is no basis for an equal protection claim since it results not from unequal treatment of persons similarly situated, but from a very real difference between petitioner's record and that of the average applicant.

Further, petitioner's reliance on a claim of privilege to insulate him against the consequences of his refusal to answer legitimate questions propounded by the subcommittee is unfounded. In this respect, it is well established that the information requested by the subcommittee, to wit, names and docket numbers of cases petitioner alleged he had filed in the Tax Court, are outside the scope of the attorney-client privilege as it exists in New Jersey and elsewhere. *U. S. v. Pape*, 144 F. 2d 778 (2nd Cir. 1944); *cert. den.* 323 U. S. 752 (1956); *In re Small*, 414 F. 2d 295, *Cert. den.* 396 U. S. 905 (1969). As such, petitioner's wilful failure to provide unprivileged answers to questions which have relevance to his qualifications for admission to the bar, are a legitimate basis for the withholding of certification. *Konigsberg v. California*, 366 U. S. 36 (1951). As this Court observed in *In re Anastaplo*, 336 U. S. 82 (1961), it is constitutionally permissible to deny an applicant admission to the practice of law so long as he "refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications." 366 U. S. at 88. See also, *Law Students Civil Rights Research Council v. Wadmond*, 401 U. S. 154 (1971). Here, as in *Konigsberg* and *Anas-*

Cohn, petitioner, after consistent warnings by the subcommittee that the materials requested were not privileged and that his failure to disclose them was obstructing the fact finding process, remained adamant. Under the circumstances, the subcommittee's failure to certify him is clearly valid."

Petitioner avers that he sustained the burden of showing his good moral character through his application form and the submission of other licenses and character testimonials and that accordingly the inquiry with respect to his character was required to go no further. Setting aside for a moment the facts that petitioner's character testimonials were obtained from Bar members holding insurance accounts with his family business (T64, 65—November 19, 1970), it is clear that the Character Committee need not accept the evidence submitted by petitioner as final. As this Court observed in *Konigsberg, supra*, after an applicant submits enough evidence of good character to make a *prima facie* case:

> The examining Committee then has the opportunity to rebut that showing with evidence of bad character. *Such evidence may result from the Committee's own independent investigation, from an applicant's responses to questions on his application form, or from Committee interrogation of the applicant himself.* This interrogation may well be of decisive importance for, as all familiar with bar admission proceedings know, exclusion of unworthy candidates frequently depends upon the thoroughness of the Committee's questioning, revealing as it may infirmities in an otherwise satisfactory showing on his part. This is especially so where a bar committee, as is not infrequently the case, has no means of conducting an independent

> investigation of its own into an applicant's qualifications. 'If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admission to the applicant, just as in an ordinary suit a plaintiff may fail in his case because he has not met his burden of proof. 366 U. S. at 40-42 (emphasis added).

In the final analysis it should be observed that petitioner is, in no sense, precluded from reapplying to the Character Committee and, indeed from obtaining certification in the event that he candidly and openly cooperates in its investigation. This is not a case in which the applicant has in the past committed a base and reprehensible act which would forever preclude his admission on moral character grounds. What has happened here is that petitioner has compounded a basically troublesome record by lack of candor, evasion, recalcitrance, and obstruction of the Character Committee's investigation. The Committee is available now as it has been in the past, to reconsider petitioner so long as he faces his record squarely, and cooperates.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be denied.

Respectfully submitted,

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